IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-601

THOMAS BENNETT DRIVER,
VIRGINIA RUTH BROWN, and HAROLD REECE,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTORARI
To The United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTORARI

To The United States Court of Appeals
For the Sixth Circuit

Petitioners, Thomas Bennett Driver, Virginia Ruth Brown, and Harold Reece, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the convictions of the Petitioners in the United States District Court for the Eastern District of Tennessee, Winchester Division.

OPINIONS BELOW

None of the opinions of the Courts below have been reported. Opinions and orders in the nature of opinions of the courts below are printed in Appendix A.

JURISDICTION

The judgment sought to be reviewed, affirming the judgment of the District Court, was entered May 8, 1979, and the Order denying the Petition for Rehearing was entered September 13, 1979.

This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When the F.B.I. set out after several days' surveillance to conduct warrantless searches in hopes of obtaining the consent of the owners, and assembled at least a dozen F.B.I., State, County, and City officers to search Petitioner Driver's auto junk yard and Petitioner Brown's fenced and wooded residential property —

(a) Was a near-illiterate junk dealer's signature of a consent to search form involuntary where the F.B.I. seized control of his premises, caused his employee to summon him by telephone, misstated to him the nature of the search and alternatives to consent, and demanded that he sign the form while he was closeted in a tiny room with an F.B.I. agent and the sheriff?

(b) Was a warrantless search of Petitioner Reece's Volkswagen lawful where movement of the vehicle was rendered impossible by the F.B.I. taking Petitioner into custody when he drove up to a junk yard being searched?

(c) Where the District Court ordered suppressed the fruits of an illegal search of Petitioner Brown's residential property, by which search the F.B.I. recovered four recently stolen motor vehicles identified by their imprinted numbers, and such was the means of locating the owners, does the Fourth Amendment require the exclusion of

owners' testimony (i) identifying telephotographs of their automobiles and (ii) affirming that the vehicles had been returned to them?

2. Under an indictment charging Petitioner Driver (seller) and Petitioner Reece (purchaser) with the substantive offense of receiving and concealing a stolen Volkswagen in interstate commerce contrary to 18 U.S.C. § 2313 and charging the same conduct as an overt act pursuant to a conspiracy, are such charges proven beyond a reasonable doubt by proof merely that Driver sold Reece a legally-owned Volkswagen seven months before theft of the Volkswagen described in the indictment and that the pan and possibly the motor from the after-stolen Volkswagen was subsequently incorporatged into Reece's Volkswagen?

3. In a conspiracy prosecution under 18 U.S.C. § 371, if there is a failue of proof as to all but one of the alleged overt acts and that act has no apparent tendency to aid in achieving the objectives of the conspiracy, does the standard of proof of guilt beyond a reasonable doubt require the government to offer some evidence that the alleged overt act was done for the purpose of achieving an objective of the conspiracy?

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in-

dictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private proprty be taken for public use, without just compensation."

18 U.S.C. § 2312:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 2313:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

28 U.S.C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was based upon an indictment returned by its Grand Jury, charging defendants with violations of 18 U.S.C. §§ 371, 2313 and 2.

Motions to suppress evidence were filed and testimony heard thereon. The things searched were a large junk yard owned by the Petitioner Driver and surrounded by a fence which shielded it from public view; the residential property of petitioner Brown located several miles away; and the Volkswagen automobile of petitioner Reece who drove up to the junk yard while it was being searched. The general circumstances of the search were that the F.B.I. had been conducting surveillance, including aerial photography of vehicles located on Mrs. Brown's residential property, for several days before the search and the F.B.I. admitted it did not seek a warrant because it hoped the owners would consent to searches. In searching, they maintained radio contact with central computer records of stolen vehicle reports,

learned immediately from vehicle identification numbers whether the vehicles had been reported stolen, and upon such basis seized vehicles and parts of vehicles.

The Driver Junk Yard Search: About 12 law enforcement officers assembled by the F.B.I. converged on Driver's junk yard in Manchester, Tennessee on the morning of July 2, 1976, and finding Petitioner Driver absent, required his employee to summon him by Telephone and then to break off the telephone connection. Petitioner arrived to find armed law enforcement officers in charge of his property, checking and recording numbers from vehicles and doors, with employees and customers restricted to his garage building; the leading F.B.I. agent presented a consent to search form and informed petitioner that he needed this so that the F.B.I. would know what it was doing, that it desired to inventory the property, which petitioner viewed as referring to a counting rather than a search for vehicle identification numbers (hereinafter, VINs) and intestimony, the F.B.I. agent throughout referred to the two-day search as an "inventory." The F.B.I. informed petitioner if he did not sign the consent form they would have to get a search warrant, but he never answered the Court's questions as to whether he informed petitioner there would be no search of his property in the absence of execution of the consent form, and the only response given to the Court's questions as to whether petitioner understood that he was not required to sign was that the printed statement contained a statement that the signer understood the form. After petitioner signed the form, the F.B.I. informed him that it intended to send him to prison, and petitioner asked that searching be withheld until he consulted his lawyer. Upon arrival of the lawyer, the lawyer was informed that petitioner had signed a consent form, concluded "That was about it.", but was not told that the F.B.I. claimed to have respected petitioner's withdrawal of the consent, so the search proceeded and numerous vehicles and parts were seized.

Petitioner Brown's Residential Search: The F.B.I. proceeded to Mrs. Brown's property after commencement of the junk yard search, requested and were refused permission to search without a warrant. They nevertheless searched, found the VINs on four vehicles stored on petitioner's property, determined them to have been stolen, and seized and took the vehicles to the local sheriff's office. Mrs. Brown's motion to suppress such search evidence was sustained by the District Court by ruling handed down three business days prior to commencement of the trial. Mrs. Brown consented to the search of a small outhouse on her property, in which the F.B.I. found a large number of automobile license tags and other items taken from vehicles, and a large number of those license tags were from vehicles which had been reported stolen.

The Reece Volkswagen Search: Petitioner Reece drove up to Driver's junk yard after the F.B.I. had taken control of it. After he got out of his Volkswagen, the F.B.I. required him to proceed to the building within the junk yard where he was required to sit with others in chairs maintained by Petitioner Driver. A Chattangooga police officer who was aiding the F.B.I. then stated to an F.B.I. agent that the windshield VIN plate was not factory-installed. The F.B.I. agent, who did not claim to have viewed the plate himself, then proceded with the police officer to search the vehicle and found a different VIN on the pan of the vehicle beneath the back seat. On this basis, they then announced to petitioner Reece that he was under arrest and he was subsequently kept for approximately a week in the local county jail without any state charge being filed against him, though after he was released on bond, a warrant was filed in time for his return court appearance and the state case was dismissed. In construction, the Volkswagen engine and wheels are attached to the pan, the body is lowered onto the bolted to the pan, and VINs appear on the body under the hood and on the pan. The body VIN was the same as that of the windshield VIN plate which had been removed and replaced and the body VIN had

not been disturbed. Petitioner Reece's motion to suppress was overruled without any evidence being offered to establish the unavailability of magistrates.

The evidence and procedure on trial, to the extent material to the issues raised herein, was as follows:

The District Court granted the petitioners the right to continuing objections to evidence obtained by the searches and theretofore subject to motions to suppress. Such was the source of testimony as to automobiles and automobile parts, including two truck doors whose possession was alleged to be an Overt Act, found on Driver's premises. As to Counts charging Petitioner Brown with possessing stolen vehicles upon her property, the government produced owners who identified telephoto pictures of the vehicles by identifications ranging from the owner statements of "opinion" that the pictured vehicle was the stolen vehicle to statements that the pictured vehicle "looked like" or "resembled" the stolen vehicle. Additionally, the owners testified that their vehicles had been returned to them though the search held illegal was the means by which such vehicles were returned. Upon defensive contentions that, with the search of the Brown property not having been ruled illegal until just before commencement of the trial, the radio contact with computerized records of VINs obtained to the search was necessarily the source of this evidence, the government argumentatively responded that it did not obtain the evidence by illegal search but did not inform the Court, either by evidence or by representations of counsel, of any alternative means utilized to locate the owner-witnesses.

As to petitioner Reece's Volkswagen, the government's evidence established, by F.B.I. testimony as to non-disturbance of the concealed VIN on the body of the vehicle, that a nonstolen vehicle had been sold by petitioner Driver to petitioner Reece, that the vehicle was licensed by the State of Georgia, that 7 months later the Volkswagen discribed in the indictment's Count II and Count I, Overt Act 2, was stolen and

that its pan had been incorporated into the non-stolen Volkswagen before the time of the search. The government offered no evidence as to the source of Petitioner Reece's possession of the pan from the stolen Volkswagen or that petitioner Driver had ever had possession either of the pan or of the entire stolen vehicle. The only evidence in the record as to the source of petitioner Reece's possession of the pan was defensive testimony that he had purchased it and had it installed by a seller in the State of Georgia and that such purchase included only the pan and not the motor, though the seller could have left the motor attached to the stolen pan and to save labor, could have exchanged motors as well as installing the new pan in place of Reece's damaged pan. Such testimony was offered after admission, over objection, of government-tendered evidence of a German computer printout without evidence of actual comparison of numbers, that the motor in Petitioner Reece's Volkswagen had the same motor number as that shown to have been installed in the vehicle whose pan was incorporated into Petitioner's auto.

Count I of the indictment charged conspiracy to willfully and knowingly transport and receive, conceal and store stolen vehicles in interstate commerce in violation of 18 U.S.C. §§ 2312 and 2313. Four Overt Acts were charged. Act Number Two charged that petitioner Reece, with the aid of petitioner Driver, received and concealed the stolen vehicle whose pan Reece was proven to have possessed; Act #3 was effectively removed from the Indictment by entry of a directed judgment of acquittal as to the co-defendant therein charged for lack of proof that he or any other defendant possessed a second stolen Volkswagen; Act #4 charges Petitioner Driver possessed auto parts which were recovered by means of the search whose legality he questions.

Overt Act #1 charged that Petitioner Brown, aided and abetted by Petitioner Driver, "possessed license plates belonging to vehicles which had been stolen . . ." No evidence was introduc-

ed for the purpose of proving or having the tendency to prove that the continuing possession of such incriminating evidence — as distinguished from the intial *removal* of the license plates — had any tendency to achieve the purposes of transporting, receiving, concealing or storing stolen motor vehicles and it was defensively asserted that such did not constitute an overt act. Upon conclusion of the government's proof, each petitioner moved for entry of verdict of acquittal which the District Court took under advisement, requiring defendants then to offer proof if they desired. Subsequently, the learned District Court refused to consider the motion for acquittal under advisement on the ground that these petitioners had waived it by offering evidence, and the Court likewise overruled such motions made at the close of all the evidence in the case. Upon appeal, petitioners urged the Court of Appeals to hold that the refusal to rule upon the merits of the motion for judgment of acquittal was contrary to Rule 29, Federal Rules of Criminal Procedure, but the learned Court of Appeals made no mention of such issue in its order disposing of the appeal and the petition for rehearing.

REASONS FOR GRANTING THE WRIT

Regarding the Question 1(a) search, the decision of the Court of Appeals was in conflict with applicable decisions of this Court, principally the holdings of *Schneckloth* v. *Bestamonte,* 412 U.S. 218, that the consent must be truly voluntary and of *Bumper* v. *North Carolina,* 391 U.S. 543, that the burden rests upon the prosection to prove the lawfulness of the warrantless search. Such decision is also contrary to decisions of other circuits in *United States* v. *Ruiz-Estrella,* 418 F.2d 723 (2 Cir., 1973) and *United States* v. *Rothman,* 492 F.2d 1260 (9 Circ., 1973), distinguishing between the friendly atmosphere of the *Schneckloth* search and the use of a show of force, apparently lawful authority, or governmental misrepresentations, to obtain a consent only nominal in fact.

Upon the Question 1(b) search, the Court's holding was in conflict with *United States* v. *Chadwick,* 433 U.S. 1, and while the Court cited no authority for its decision upon this issue, the prosecution's reliance in the Court of Appeals upon *Chambers* v. *Maroney,* 399 U.S. 42 would appear misplaced because that decision was distinguished in *Chadwick, supra,* by distinction equally applicable to the instant case.

In regard to the Question 1(c) search, the Court's decision is contrary to this Court's *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, and its progeny including *G. M. Leasing Corp.* v. *United States,* 429 U.S. 336.

Under Questions 2 and 3, the learned Court of Appeals' failure to determine whether guilt had been proven beyond a reasonable doubt was contrary to the rationale of *Jackson* v. *Virginia,* U.S. , 61 L.Ed.2d 560. In its Question 2 holding that possession of two major component parts of a stolen vehicle constitute possession of an entire vehicle, the Court's holding was contrary to the holding of another circuit in *United States* v. *Shanks,* 521 F.2d 83 (7 Circ., 1975) as well as being utterly in disregard of the fact that there was no eviden-

tiary basis for assuming that either of the convicted appellants under Count II had possessed the entire stolen vehicle from which the pan was taken or that such possession, if assumed, occurred in Tennessee rather than in Georgia, where the Volkswagen was stolen. In this regard the learned Court of Appeals' review of the Count II convictions would appear not even to come up to the standards of appellate review prevailing before decision of *Jackson* v. *Virginia, supra.* Further, the Court's decision sustaining by its silence, the use of a manufacturer's computer printout to prove that the motor of the stolen Volkswagen actually bore the motor number shown upon the printout is contrary to the decision of the District of Columbia Circuit in *United States* v. *Kim,* F.2d , 47 U.S.L.W. 1158 (D.C. Cir., April 17, 1979), as well as its own decision, *United States* v. *Davis,* 568 F.2d 514 (6 Cir., 1978).

The Court's apparent failure to consider whether the possession by Petitioner Brown of a large number of license plates from stolen vehicles could possibly be an Overt Act because of its total lack of capacity to assist in concealing automobiles would appear in conflict with the legal requisites of the conspiratorial Overt Act, stretching back in antiquity to its appearance in the law of treason, and in apparent conflict with this Court's respected holdings in *Bravermman* v. *United States,* 317 U.S. 49, *Krulewitch* v. *United States,* 336 U.S. 440 and *Fiswick* v. *United States,* 329 U.S. 211. If it be unnecessary to prove that a questionable Overt Act actually tends in some unknown manner to achieve the purposes of a conspiracy, then the statutory requisite of an Overt Act as an element of the crime is simply read out of existence. Hence this issue is a practical issue of federal law of such importance that if the foregoing authorities do not decide it, it would appear to merit decision by this Court. With possession of such license tags having been proven not merely beyond a reasonable doubt but to an absolute certainty, such proof may have removed from the jury any pressure to give serious consideration of whether Overt Act No. 4, the possession of two vehicle doors, had been proven beyond a reasonable doubt by mere opinion evidence.

Where appellate review is of right rather than discretionary, it is a denial of appellate review merely to cite a judicial decision having no relation to the issues raised upon appeal, *Proctor* v. *Warden, Maryland Penitentiary,* 435 U.S. 559. It is believed to be equally irrelevant and equally a denial of review of right for the Order of the Clerk of the Court of Appeals to state, in regard to the search of Petitioner Driver's property that there was "no privacy interest retained as the issue had appropriately resolved against appellants on disputed facts." [*sic*] — in view of the lack of dispute about those facts summarized herein, and of the fact that privacy rights were insisted upon by motion to suppress, by explicit trial objections as well as a continuing general objection allowed by the Court, and by motions for judgments of acquittal at the close of the government's case (taken under advisement but never decided), at the close of all the evidence, and after entry of the verdict. When appellate counsel can conceive no possible rationale adequate to refute the Seventh Circuit's demonstration in *Shanks, supra,* that possession of only a constituent part of an automobile does not consitute possession of the entire automobile, then the failure even to mention this issue of statutory construction and of adequacy of the evidence in regard to the conviction of petitioner Reece would appear to be a denial of appellate review.[1]

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[1] In contrast with the certiorari-like discretion Congress has given this Court in determining direct appeals, appeals to a Court of Appeals in criminal cases are appeals of right; and when the issues are vigorously contested, the judicial opinion has been the accepted means of deciding appeals. Opinion-writing compels the writer to think more carefully, *United States* v. *Forness,* 125 F.2d 928, 942 (2 Cir., 1942), approved, *United States* v. *Crescent Amusement Co.*. 323 U.S. 173, 184-185, and should diminish the number of petitions for certiorari. The increasing tendency of Courts of Appeals to exercise power without an opinion's justification is a departure from the usual course of appellate procedure which merits this Court's supervisory consideration as an occasional alternative to its careful consideration of issues on which the intermediate appellate judges have written nothing. Courts of Appeals have opinion-writing facilities not available to this Court in their power to use District Judges and Retired Judges to share their burdens, at least when serious constitutional issues are present and are competently briefed.

By such treatment of this appeal, petitioners respectfully assert that the learned Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the traditonal supervisory authority which inheres in the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For The Sixth Circuit

United States of America Plaintiff-Appellee v. Thomas Bennett Driver, Virginia Ruth Brown, Harold Reece, Defendants-Appellants	No 78-5211

ORDER
(Filed May 8, 1979)

Before EDWARDS, Chief Judge, KEITH, Circuit Judge and PECK, Senior Circuit Judge.

On August 26, 1977, appellants and a fourth defendant were indicted under a ten-count indictment charging a conspiracy and nine substantive offenses relating to the receipt and concealment of stolen motor vehicles in interstate commerce, in violation of 18 U.S.C. §§371 and 2313. After a jury trial beginning January 31, 1978, appellants were convicted on the conspiracy count and various other counts charging substantive offenses. Concurrent sentences were imposed upon each appellant on each count which resulted in a conviction.

The evidence adduced at trial established that appellants were tied into a large-scale auto theft operation. Appellants would acquire stolen vehicles with the purpose of disassembling them and reselling their various component parts. In addition to the selling of the mechanical parts, appeallants also disassembled the bodies of the vehicles for the purpose of resale after being reassembled in what would appear to be entirely different vehicles. To make the scheme effective, appellant Driver also

bought wrecked or recovered stolen vehicles from their owners or from insurance companies for the purpose of acquiring new and different identification numbers and frames on to which components of the stolen vehicles could be reassembled. The frames from the stolen vehicles were cut into two-foot lengths and then sold for scrape metal.

Appellants' primary appellate arguments relate to claimed Fourth Amendment abuses. Analysis of each must be rejected either because there was consent to the search, or there was no privacy interest retained as the issue had appropriately resolved against appellants on disputed facts.

Upon due consideration of the record on appeal, the briefs and oral arguments of counsel for the parties and being fully advised in the premises, the Court is of the view that appellants' allegations of error are all without merit.

Therefore, it is ORDERED that appellants' convictions be, and the same hereby, are affirmed.

ENTERED BY ORDER OF THE
COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

United States Court of Appeals
For The Sixth Circuit

United States of America Plaintiff-Appellee v. Thomas Bennett Driver, Virginia Ruth Brown, Harold Reece, Defendants-Appellants	No 78-5211

ORDER

(Filed September 13, 1979)

BEFORE: Edwards, Chief Judge, Keith, Circuit Judge, and Peck,
Senior Circuit Judge

No judge in the active service of this Court having requested that a vote be taken on the suggestion that the petition for rehearing filed in this cause be heard en banc, said petition for rehearing was referred to the hearing panel for consideration.

Upon consideration of the petition for rehearing filed herein by appellants, we conclude that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be, and the same hereby is, denied.

ENTERED BY ORDER OF THE
COURT
/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

In The United States District Court For The
Eastern District of Tennessee

United States of America
Plaintiff,
v.
Thomas Bennett Driver, et al
Defendants.
No CR-4-77-7

Memorandum and Order

(Filed September 21, 1977)

The defendant Mr. Thomas Bennett Driver moved for a continuance of the trial herein which is now assigned to commence Tuesday, October 4, 1977. The Court hereby FINDS that the ends of justice which will be served by granting such continuance outweigh the best interest of the public and the respective defendants herein in a speedy trial. 18 U. S. C. § 3161 (h) 8 (a).

Four defendants are indicted herein. A grand jury charged in court one of such indictment that all such defendants conspired to violate certain federal laws and committed four overt acts in furtherance of the purpose thereof. Substantive violations of federal law are charged against one or two of such defendants in the latter nine counts of the indictment.

The aforementioned indictment was returned on August 26, 1977. The defendants Messrs. Driver and Harold Reece have been arraigned herein, and each entered a plea of not guilty to each count of such indictment under which the defendant is charged. The Court is advised that the defendant Mr. William Prescott Talbert may have been placed under arrest, but he

has not yet been presented for arraignment. Where an indictment has charged two or more defendants with a conspiracy and also with substantive offenses, all defendants and all counts are ordinarily tried together. *Cf. Opper* v. *United States* (1954), 348 U. S. 84, U. S. 84, 94-95, 75 S Ct. 158, 99 L. Ed. 101, 109-110 (headnotes 6, 7).

Mr. Driver claims that the unavailability of his counsel threatens to deprive him of his right to counsel of his choice; that mature investigation may reflect that he has been deprived of his right to due process of law, Constitution, Fifth Amendment; and that he requires considerable additional time to investigate the viability of certain pre-trial motions and to have them determined by the Court to narrow his defenses "*** to manageable proportions.***" The choice by Mr. Driver of counsel to represent him herein is certainly part and parcel of his right to counsel under the Constitution, Sixth Amendment. *United States* v. *Seale,* C. A. 7th (1972), 461 F. (2d) 345, 358-359 [12]. Additional time to prepare adequately for trial, when it is needed to properly prepare and try his case, is likewise certainly the right of a defendant. *Everitt* v. *United States,* C. A. 5th (1960), 281 F. (2d) 429, 434 [4].

There are specified defenses capable of determination without the trial of the general issue which must be raised by motion before trial. Rule 12 (b), Federal Rules of Criminal Procedure. The Court has a responsibility to set a time for the making of pretrial motions and, where required, a later date of hearing. Rule 12 (c), Federal Rules of Criminal Procedure.

As Mr. Driver's counsel will not be available to client for meaningful consultation until October 5, 1977, the Court hereby SETS midnight, December 5, 1977 as the time by which each defendant herein must make any and all pretrial motions. *Idem.* The motion of the defendant Mr. Driver for a continuance of trial herein hereby is GRANTED; and this action

hereby is REASSIGNED for trial upon all pleas of not guilty to the indictment herein to commence at 9:00 o'clock, a. m., Monday, January 9, 1978.

After reviewing any such pretrial motions which may be filed, the Court will assign a time for any hearing thereon as may appear to be required. Each defendant, enlarged upon bail bond, will stand upon that bond until time of trial.

ENTER:

/s/ C. G. NEESE
United States District Judge

APPENDIX D

In The United States District Court For The
Eastern District of Tennessee

United States of America
Plaintiff,
v.
Thomas Bennett Driver, et al
Defendants.
No CR-4-77-7

Memorandum Opinion and Order

(Filed December 6, 1977)

This is a criminal action against four defendants. The motion of the defendant Mr. Driver for a continuance of the trial herein assigned to commence Tuesday, October 4, 1977 was granted, and trial of all the defendants was reassigned to commence January 9, 1978. See memorandum and order herein of September 21, 1977.

On November 30, 1977, the other defendants, Ms. Virginia Ruth Brown and Messrs. Harold Reece and William Prescott Talbert, moved for a further continuance on the ground that their common retained counsel is ill and, in the estimation of his attending surgeon, will be unable to resume his professional activities until about January 18, 1978. The illness of counsel ordinarily constitutes good cause for the continuance of trial. *Cf. United States* v. *Tramunti,* C. A. 2d (1975), 513 F. (2d) 1087, 1116-1118 [40-41], [42], [43], [44], [45], certiorari denied (1975), 423 U.S. 832, 96 S. Ct. 54, 55, 46 L. Ed. (2d) 50.

FINDING that the ends of justice which will be served by granting the further continuance requested by three of the four defendants outweigh the best interest of the public and the

respective defendants herein in a speedy trial, 18 U. S. C. § 3161 (h) (8) (a), the Court hereby SETS midnight, January 18, 1978 as the time by which each defendant herein must make any and all pretrial motions, Rule 12 (c), Federal Rules of Criminal Procedure. Any evidentiary hearing found to be indicated as a result thereof will be conducted on January 23, 1978, commencing at 1:00 o'clock, p.m. or as soon thereafter as such may be reached on the Court's calendar. This action is further REASSIGNED for trial upon all pleas of not guilty herein to commence at 9:00 o'clock, a.m., Tuesday, Janaury 31, 1978. Each defendant, enlarged upon bail, will stand on his or her present bond until time of trial.

ENTER:

/s/ (C. G. NEESE)
United States District Judge

APPENDIX E

In The United States District Court For The
Eastern District of Tennessee

United States of America,
Plaintiff,
v.
Thomas Bennett Driver, ET AL.,
Defendants.
No. CR-4-77-7

Memorandum Opinion and Order

(Filed December 8 1977)

The defendants Mr. Driver and Ms. Brown seprately moved the Court to order the government to produce for purposes of their discovery and inspection certain categories of documents and other tangible evidence. Such motions are premature, and thus lack merit at this time.

The defendants have no general constitutional right to discovery in a criminal case, *Weatherford* v. *Bursey* (1977), U.S. , , 97 S. Ct. , 51 L.Ed. (2d) 30, 42 [6]; but rather, any such discovery is governed by the provisions of Rule 16, Federal Rules of Criminal Procedure. "***The language of Rule 16, as amended in 1975, has been recast from 'the court may order' or 'the court shall order' to 'the government shall permit' ***in order to make clear that discovery shall be accomplished by the parties themselves. Only if there is a failure to comply should the court have to interfere. ***" 1 Wright, Federal Practice and Procedure: Criminal 221 (1976 Suppl.), § 258; *accord:* 8 Moore's Federal Practice (2d ed.) 16-48, paragraph 16.03 [1].

In considering the aforementioned amendments, as proposed by the Supreme Court, the Committee on the Judiciary of the

House of Representatives noted that, thereunder, "***the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.***" Notes on Committee on the Judiciary House Report No. 94-247, Historical Note, Rule 16, Rules of Criminal Procedure, 18 U. S. C. A. page 358. Such committee "***agree[d] that the parties should, to the maximum possible extent, accomplish discovery themselves *** [and that] *** [t]he court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d). ***" *Idem.*

Neither of the moving defendants claim to have made any previous request of the plaintiff for the discovery or inspection of any of the materials sought by such motions. Neither does the same appear from the record herein. The Court notices judicially that the United States attorney for this district complies ordinarily with the request of a criminal defendant for the discovery of any materials which are permitted by Rule 16, *supra,* thus making unnecessary generally motions such as the instant one. Under those circumstances, the Court feels that any intervention by it into the parties' extrajudicial discovery process at this time would be contrary to the policy expressed by the Congress and the Supreme Court in promulgating and enacting the 1975 amendments to Rule 16, *supra.*

Accordingly, the defendants' aforementioned motions hereby are DENIED without prejudice to their renewal of the same upon any failure of the plaintiff to comply with the provisions of Rule 16, *supra.*

ENTER:

/s/ (C. G. NEESE)
United States District Judge

APPENDIX F

In The United States District Court For The
Eastern District of Tennessee

United States of America,
Plaintiff,
v.
Thomas Bennett Driver, ET AL.,
Defendants.
No. CR-4-77-7

Memorandum Opinion and Order

(Filed January 19, 1978)

The defendants Ms. Brown and Messrs. Reece and Tolbert moved the Court on January 17, 1978 for additional time within which to file pre-trial motions herein and also for a continuance of the evidentiary hearing scheduled for January 23, 1978 and the trial hereof assigned to commence on January 31, 1978.

The indictment herein was returned by a grand jury of this district on August 26, 1977 and, subsequently, the defendants were arraigned, at which time trial hereof was assigned to commence on October 4, 1977. On motion of the defendant Mr. Driver, such trial date was reassigned to January 9, 1978, and the Court set midnight, December 5, 1977 as the time by which each defendant herein would be required to make any and all pretrial motions, Rule 12 (c), Federal Rules of Criminal Procedure. Memorandum and order herein of September 21, 1977. The Court further continued the trial of this action until January 31, 1978 on the motion of the aforenamed 3 defendants due to the illness and hospitalization of their counsel T. Arthur Jenkins, Esq. Memorandum opinion and order herein of December 6, 1977. At that time, the time by which each defendant must make any and all pretrial motions was reassigned to January 18, 1978.

The affidavits and other documents submitted in support of the present motion indicate that Mr. Jenkins is still in the process of slow recovery from his surgery of November 23, 1977, and that his professional activities have been, and will continue to be, somewhat curtailed as a result thereof. Nevertheless, these defendants make no claim of having attempted to secure substitute counsel. If Mr. Jenkins is not able physically to effectively represent them, the defendants or Mr. Jenkins should arrange for other counsel who is able physically to do so.

Under less extraordinary circumstances, the Court would be better able to accommodate to Mr. Jenkins' indisposition and his clients' loyalty to counsel of their choosing. It is represented that Mr. Jenkins' health will not permit his appearance until the middle of April. The requirements of the Speedy Trial Act and other responsibilities require the presence of the presiding judge of this division in the Northeastern Division of this Court in the period after February 8 and beyond April, next.

Ms. Brown and Messrs. Reece and Tolbert also moved separately for a dismissal of the indictment herein on the ground that they have been "***denied a speedy trial in compliance with 18 U. S. C. § 3161 (b)***" and the Constitution, Fifth and Sixth Amendments. If that be the case, then, certainly, any continuance herein would further impinge upon such respective defendants' claimed rights to a speedy trial herein. Under such circumstances, the Court does not find that the ends of justice served by a continuance outweigh the best interest of the public and the defendants in a speedy trial. 18 U. S. C. § 3161 (h) (8) (A).

Accordingly, the aforementioned motion hereby is DENIED, in its entirety; except that the Court hereby SETS midnight, Saturady, January 21, 1978 as the time by which each defendant must make any and all pretrial motions. Rule 12 (c), *supra*.

ENTER:
/s/(C. G. NEESE)
United States District Judge

APPENDIX G

In The United States District Court For The
Eastern District of Tennessee

United States of America,
Plaintiff,
v.
Thomas Bennett Driver, ET AL.,
Defendants.
No. CR-4-77-7

Memoranda Opinions and Orders

(Filed January 20, 1978)

A United States magistrate of this district recommended that certain motions herein of the defendant Mr. Driver be denied. 28 U. S. C. § 636 (b) (1) (B). Such defendant served and filed timely written objections to such recommendation, and the undersigned judge has considered de novo those portions of the magistrate's recommendation to which objection was made. 28 U. S. C. § 636 (b) (1).

Mr. Driver is not entitled to a dismissal of the indictment herein on the ground that the copy thereof furnished to him does not contain thereon the signature of the grand jury foreman. The indictment filed herein is properly signed. See Rule 6 (c), Federal Rules of Criminal Procedure. The plaintiff hereby is ORDERED to furnish to such defendant a signed copy of the indictment herein of August 26, 1977.

Such defendant is not entitled to a dismissal of the indictment hereon on his claim that same was based upon evidence illegally obtained. Such a motion is not the proper vehicle to raise this contention. *Brothers* v. *United States,* C. A. 9th (1970), 431 F. (2d) 644, 645 [1]; see also: *United States* v. *Isaacs,* D. C. Ill.

(1972), 347 F. Supp. 743, 757 [26] and *United States* v. *Markey,* D. C. N. Y. (1975), 405 F. Supp. 854, 863.

Mr. Driver also contends that preindictment delay requires the dismissal of the indictment herein. "***If a defendant can show actual substantial prejudice to his right to a fair trial *and* [emphasis supplied] that the delay was deliberately created to gain an unfair tactical advantage for the government, he is entitled to dismissal [of the indictment] for violation of the Fifth Amendment due process rights.***" *United States* v. *Swainson,* C. A. 6th (1977), 548 F. (2d) 657, 663 [14]. Mr. Driver makes no claim of any prejudice because of any delay in the return of the indictment herein, much less any claim that such was deliberately created to gain an unfair tactical advantage for the government.

"***[T]o prosecute a defendant following investigative delay does not deprive him of due process.***" *United States* v. *Lovasco* (1977), U. S. , , 97 S. Ct. 2044, 2052 [9], 52 L. Ed. (2d) 752. Certainly Mr. Driver has not demonstrated "***actual substantial prejudice to his right to a fair trial.***" *United States* v. *Swainson, supra,* 548 F. (2d) at 663 [14].

The indictment herein is not overbroad or vague, and it is otherwise sufficient. *Hamling* v. *United States* (1974), 418 U. S. 87, 117-118, 94 S. Ct. 2887, 41 L. Ed. (2d) 590, 620-621 [25-27]; *United States* v. *Debrow* (1953), 346 U. S. 374, 74 S. Ct. 113, 98 L. Ed. (2d) 92; *United States* v. *Brannan,* C. A. 6th (1972), 457 F. (2d) 1062, 1063-1065 [1,2]; Rule 7 (c) (1), Federal Rules of Criminal Procedure; see also Forms 6 and 7, Federal Rules of Criminal Procedure, Appendix of Forms.

Mr. Driver is mistaken in his contention that 18 U. S. C. §§ 2, 2312 and 2313 are unconstitutional. *Brooks* v. *United States* (1925), 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699; *Williams* v. *United States,* C. A. 4th (1971), 443 F. (2d) 1151, 1155 [11]; *United States* v. *Hooper,* C. A. 6th (1970), 438 F. (2d) 969, certiorari denied (1970), 400 U. S. 929, 91 S. Ct. 189, 27 L. Ed. (2d) 190; *United States* v. *Newson,* D. C. La. (1956), 144 F. Supp. 464, 466 [3].

Accordingly, the objections of Mr. Driver to the magistrate's aforementioned recommendation hereby are OVERRULED; such recommendation hereby is ACCEPTED, 28 U. S. C. § 636 (b) (1); and Mr. Driver's motion (no. 1) herein of September 19, 1977 for a dismissal of the indictment herein hereby is DENIED in its entirety.

The magistrate also recommended that the motion (no. 5) herein of the defendant Mr. Driver for relief from prejudicial joinder, Rule 14, Federal Rules of Criminal Procedure, be denied. The unsupported allegations made by Mr. Driver in support of such motion are not sufficient to require such relief. *United States* v. *Armocida,* C. A. 3d (1975), 515 F. (2d) 29, 46 [32].

"*** [T]he general rule in conspiracy cases is that persons jointly indicted should be tried together and that this is particularly true where the offenses charged may be established against all of the defendants by the same evidence and which result from the same series of acts. ***" *United States* v. *Dye,* C. A. 6th (1974), 508 F. (2d) 1226, 1236 [21], certiorari denied (1975), 420 U. S. 974, 95 S. Ct. 1395, 43 L. Ed. (2d) 653. It not appearing that Mr. Driver is, or will be, prejudiced by a joinder of offenses herein or by such joinder for trial together, the Court hereby ACCEPTS the magistrate's recommendation, and in its discretion, *ibid.,* 508 F. (2d) at 1236 [20], hereby DENIES such motion.

The magistrate also recommended that Mr. Driver's motion (no. 4) herein of Septemberr 19, 1977 for certain discovery be denied as having been rendered moot. The Court having previously denied such motion as being premature, memorandum opinion and order herein of December 8, 1977, and the government having apparently fully responded to an apparent

subsequent request for the production of the materials sought thereby, the magistrate's recommendation hereby is ACCEPTED and such motion hereby is

DENIED

Mr. Driver also moved for a bill of particulars.* Rule 7 (f), Federal Rules of Criminal Procedure. It appearing that the indictment herein is not too vague nor indefinite to inform such defendant of the nature of the respective charges against him herein with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offenses, *United States* v. *Brimley,* C. A. 6th (1976), 529 F. (2d) 103, 108 [12], in the discretion of the Court, *Will* v. *United States* (1967), 389 U. S. 90, 98-99, 88 S. Ct. 269, 275 [13], 19 L. Ed. (2d) 305, such motion hereby is

DENIED

The aforementioned magistrate also recommended on January 5, 1978 that certain motions herein of the defendant Ms. Brown be denied, 28 U. S. C. § 636 (b) (1) (B), and a copy of such recommendation was mailed to counsel for such defendant on the same date, 28 U. S. C. § 636 (b) (1). No timely written objections thereto have been served and filed. *Idem.* The undersigned judge hereby ACCEPTS such recommendation in its entirety. *Idem.*

The motion of Ms. Brown for a separate trial, Rule 14, Federal Rules of Criminal Procedure, hereby is

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* The magistrate did not make a recommendation as to the Court's disposition of this motion, so the Court will consider such motion de novo.

DENIED. *United States* v. *Armocide,* C. A. 3d (1975), 515 F. (2d) 29, 46 [32]; *United States* v. *Goble,* C. A. 6th (1975), 512 F. (2d) 458, 465-466 [4]; *United States* v. *Franks,* C. A. 6th (1975), 511 F. (2d) 25, 30 [3], certiorari denied (1975), 422 U. S. 1042, 1048, 95 S. Ct. 2654, 2656, 2667, 45 L. Ed. (2d) 693, 701; *United States* v. *Dye, supra,* 508 F. (2d) at 1236 [20], [21].

The Court having previously denied the motion of the aforenamed defendant for discovery and inspection as being premature, memorandum opinion and order herein of December 8, 1977, such motion is MOOT and hereby is

DENIED.

The government moved the Court for certain discovery and inspection as to the defendants Mr. Driver and Ms. Brown, see Rule 16 (b) (1) (A), (B), Federal Rules of Criminal Procedure. For the reasons stated in this Court's memorandum opinion and order herein of December 8, 1977, such respective motions are premature, and for such reason hereby are DENIED without prejudice to the government's renewal of the same upon any failure of such respective defendants to comply with the provisions of Rule 16 (b) (1) (A), (B), *supra.*

ENTER:

/s/ C. G. NEESE
United States District Judge

APPENDIX H

In The United States District Court For The
Eastern District of Tennessee

United States of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, ET AL.,
Defendants.

Memorandum Opinion and Order

(Filed January 26, 1978)

The defendant Ms. Virginia Ruth Brown moved the Court to suppress as evidence herein all property seized from her residential premises on July 2, 1977 (sic: 1976) by law enforcement officers. Rule 41 (f), Federal Rules of Criminal Procedure. Items of property were taken from the curtilage of her premises as well as from within a locked outbuilding. An evidentiary hearing thereon was conducted pretrial on January 24, 1978, Rule 12 (e), Federal Rules of Criminal Procedure.

Ms. Brown returned to her trailer-home near Manchester, Tennessee on July 2, 1976 in a pickup truck. Her trailer is located about 300 feet off the nearest main road, and there is a "no trespassing" sign implaced at the entrance of her residential premises.

Mr. Donald W. Aaron and other special agents of the Federal Bureau of Investigation arrived and identified themselves as such to Ms. Brown in her backyard and advised her that they knew the blue pickup truck parked in the front of her home was stolen, and that they assumed four other trucks parked nearby were stolen also. Ms. Brown replied that she knew nothing about such matters and desired to talk with her attorney.

When it was determined that Ms. Brown's attorney was T. Arthur Jenkins, Esq., Mr. Aaron suggested she might be able to locate him at Driver's Garage and Junkyard. In due time, Ms. Brown advised Mr. Aaron that Mr. Jenkins wished to speak with him on the telephone. In the ensuing telephone conversation, Mr. Jenkins gave Mr. Aaron permission "***to go ahead and search***" Ms. Brown's premises and stated he had advised Ms. Brown to give her permission; however, it is not claimed that Ms. Brown, herself, gave the government agents her consent to search her premises.

Mr. Aaron conceded that he was not authorized by any warrant to search Ms. Brown's premises and to seize anything therefrom, see and *cf.* Rules 41 (a), (b), (c), Federal Rules of Criminal Procedure. The officers had no information of the presence of exigent circumstances involving the 5 trucks mentioned which would have justified their proceeding without a search warrant.

A few hours after the aforementioned Jenkins-Aaron telephone conversation, Mr. Jenkins, Esq. came to the scene of the search and seizure. Ms. Brown gave him the key to an outbuilding on her property; Mr. Jenkins opened the lock and door; and the officers entered it and searched and seized items therefrom.

The salient question is whether consent given by one's attorney to search his client's premises without a search warrant is to be deemed the consent of the occupant of those premises. The Court, at the hearing herein and without the full benefit of briefs from counsel, was of the mistaken view that the waiver of a Fourth Amendment right against unreasonable search and seizure required "***an intentional relinquishment or abandonment of a known right.***" *Johnson* v. *Zerbst* (1938), 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461. However, the Sureme Court, in a 6-3 decision, has rejected the contention that the *Zerbst* rule should be extended to the constitutional

guarantee against unreasonable searches and seizures. *Schneckloth* v. *Bustamonte* (1973), 412 U. S. 218, 241, 93 S. Ct. 2041, 2055, 36 L. Ed. (2d) 854.

"The right of the people to be secure in their *** houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. ***" Constitution, Fourth Amendment. The right given by the Constitution, Fourth Amendment, is personal. *United States* v. *Strouth,* D. C. Tenn. (1970), 311 F. Supp. 1088, 1090 [3]. "*** [A] search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'*** One of the specifically established exceptions *** is a search that is conducted pursuant to consent. ***' *Schneckloth* v. *Bustamonte, supra,* 412 U. S. at 219, 93 S. Ct. at 2043-2044 [1,2], cited in *United States* v. *Matlock* (1974), 415 U. S. 164, 165-166, 94 S. Ct. 988, 990, 39 L. Ed. (2d) 242.

The Court has discovered only one case in which a court has validated the search of his client's property on consent of an attorney, after the attorney had consulted with his client. *Brown* v. *State* (1965), 81 Nev. 397, 404 P. (2d) 428. This adjudication appears to run counter to the latest expression of our Circuit, finding it "***well settled that a third person, other than the defendant, can consent to a search of a defendant's premises or effects if that third person has *common authority over the premises* [emphases supplied] or effects.***" *United States* v. *Sumlin,* C. A. 6th (1977), F. (2d) , [ ] (No. 77-5076 decided and filed December 14, 1977). It also appears to this Court to run counter to expressions from the Supreme Court.

That Court reversed a state judgment of conviction wherein a night clerk had given law enforcement officers permission to search the room of the defendant who was a guest in that hotel. The reasoning of Mr. Justice Steward is instructive herein:

* * * * * * *

[T]here *** [is no] *** substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority."

It is important to bear in mind that it was the petitioner'sconstitutional right which was at stake here, and not the night clerk's nor the hotel's. *It was a right,* therefore, *which only the* petitioner [*defendant*] *could waive by word or deed,* either directly or through an agent. *** [Emphasis supplied.]***

Stoner v. *State of California* (1964), 376 U. S. 483, 488-489, 84 S. Ct. 889, 892-893, 11 L. Ed. (2d) 856, rehearing denied (1964), 377 U. S. 940, 84 S. Ct. 1330, 12 L. Ed. (2d) 303.

Neither can rights protected by the Fourth Amendment be eroded because the person giving consent to a search happens to be the attorney for the person searched. "Attorney has express authority to do all those acts which he has been expressly authorized to do by the client; and, in addition, he has, by virtue of the retainer or employment alone, the general implied authority to do on behalf of the client, in or out of court, all acts necessary or incidental to the prosecution or management *of the suit,* or the accomplishment of the purpose, for which he was retained, and apparent authority to exercise those powers which the client has held him out to third persons as possessing." 7 C. J. S. 896, Attorney and Client, § 79 (emphasis supplied). But, "*** [t]he implied authority of an attorney ordinarily does not extend to the doing of acts which will result in the surrender or giving up of any substantial right of the client.***" *Ibid.*, 7 C. J. S. at 897, citing *inter alia* , *Holt* v.

State (1930), 160 Tenn. 366, 24 S. W. (2d) 886. Again: "The employment or retainer of any attorney ordinarily gives him the implied or apparent authority to waive mere informalities and technicalities, but not the substantial legal rights of the client." *Ibid.*, 7 C. J. S. at 922, § 100c.

Holt, supra, deait with the unauthorized action of an attorney in connection with the conduct of a criminal trial itself. In the absence of the defendant, his counsel undertook to waive his client's presence and to agree to a mistrial. The Tennessee Supreme Court ruled that those actions by the attorney were beyond his authority; that the attorney could not waive his client's constitutional rights to be present all the while determinative steps in a felony prosecution were being taken against him, and his right not to be put in jeopardy a second time for the same offense. The highest court in this stae asserted that the latter right "***is as important as the right to be tried by jury, and is guarded with as much care." *Ibid.*, 24 S. W. (2d) at 887.

Certainly, Ms. Brown's federal right to be secure in her home and effects against unreasonable search and seizure was equally important and to be guarded with as great care. This guarantee "***marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation.***" *McDonald* v. *United States* (1948), 335 U. S. 451, 453, 69 S. Ct. 191, 93 L. Ed. 153, 157.

The government law-enforcement officers had no search warrant for the property of Ms. Brown; there was no reason why they could not have obtained one. They searched her property and seized vehicles therefrom without *her* consent.*

*It is of some significance that officers engaged in the same investigation of crime obtained the written consent of a codefendant of Ms. Brown before searching his *commerical* property and seizing articles therefrom.

To protect this valuable right for all citizens of this nation and others within its jurisdiction, Ms. Brown's motion to suppress the evidence of the five vehicles seized unlawfully from her property must be, and it hereby is GRANTED, and such evidence hereby is SUPPRESSED.

A different rule applies with regard to the search of Ms. Brown's outbuilding and the seizure of items therefrom. Even 'though she had posted her premises against trespassers and had given the government agents who intruded thereon no permission to be upon them, once they were there, by her actions, she withdrew her expectation of privacy as to the property within an outbuilding upon her premises.

When she provided her attorney with the key thereto and allowed him to unlock the door and admit the officers, she exposed knowingly that portion of her premises to the view of the officers. Thus, the inside of her outbuilding was no longer a subject of the protection afforded by the Constitution, Fourth Amendment. *Katz* v. *United States* (1967), 389 U. S. 347, 351, 88 S. Ct. 507, 511 19 L. Ed. (2d) 576, 582. As to the search and seizure of items therefrom, accordingly, Mr. Brown's motion to suppress the evidence provided thereby hereby is OVERRULED.

ENTER:

/s/ (C. G. NEESE)
United States District Judge

APPENDIX I

In the United States District Court for the
Eastern District of Tennessee

United States of America,
Plaintiff,

v.

No. CR-4-77-7

Thomas Bennett Driver, et al.,
Defendants.

Memorandum Opinion and Order

(Filed January 26, 1978)

The defendant Mr. Driver, aggrieved by an allegedly unlawful search and seizure of items of his property, moved the Court for the return thereof on the ground that he is entitled to lawful possession thereof, Rule 41 (e), Federal Rules of Criminal Procedure, and to suppress the evidence resulting from such search and seizure, Rule 41 (f), Federal Rules of Criminal Procedure. An evidentiary hearing thereon was conducted pretrial on January 23-24, 1978, Rule 12 (e), Federal Rules of Criminal Procedure.

Agents of the Federal Bureau of Investigation and Tennessee bureau of criminal identification and the sheriff of Coffee County, Tennessee and his deputies examined and seized certain automotive portions and parts as evidence of crime from the premises of Mr. Driver on July 2, 1976. None of them acted at the pertinent times under the authority of a warrant to search such premises and seize such property, cf. Rules 41 (a), (b), (c), Federal Rules of Criminal Procedure.

The aforementioned articles of property were seized by the officers indicated after Mr. Driver had signed a form, which stated:

July 2, 1976
(Date)
Manchester, Tenn.
(Location)

I, *Thomas Bennett Driver,* having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize *Sheriff Bobby McCullough,* and *John D. Jones,* Special Agents of the Federal Bureau of Investigation, United States Department of Justice, to conduct a complete search of my premises located at *Drivers Garage & Junkyard, Route 4, Woodbury Highway, Manchester, Tenn.* These agents are authorized by me to take from my premises any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above named Special Agents voluntarily and without threats or promises of any kind.

(SIGNED) */Thomas S. Driver*

WITNESSES: John D. Jones, Special Agent, FBI
Bobby McCullough, Sheriff

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall no be violated. * * * " Constitution, Fourth Amendment. The right given by the Constitution, Fourth Amendment, is personal and may be waived. *United States* v. *Strouth,* D. C. Tenn. (1970), 311 F. Supp. 1088, 1090 [3]. "* * * Consent that is unequivocal, specific and voluntarily given without duress or coercion, actual or implied, is effective as waiver of any objection to the admission of evidence so obtained. *United States* v. *Strouth, [supra],* * * * 1094. * * * "*United States* v. *Ward,* D. C. Tenn. (1973), 365 F. Supp. 1342, 1344 [3].

Mr. Driver testified that he understood he was giving the officers permission to "inventory" the articles on his premises, that he understood *"inventory" to imply "counting", and that he "* * * really * * * " didn't know what he was signing. He operated a sole proprietorship in the automotive junk-parts business in this same location for 24 years, and the Court FINDS that his foregoing consent was unequivocal, specific, voluntary, and given without actual or implied duress or coercion. His chief complaint is that some of the officers in this joint-enterprise examination commenced their search before he had signed the foregoing consent-form.

His premises constituted a business operation, open to members of the general public, with various automotive parts, portions of vehicles, and related articles lying, stacked, and leaning against other objects. These premises had formerly constituted Mr. Driver's family home, in addition to his garage and junkyard premises. When government laws and regulations required him to erect a solid fence to conceal it from the members of the public passing along the adjacent roadways, his family moved elsewhere, although Mr. Driver continued to use the residence on these premises as a part-time residence. Thus it was, that Mr. Driver utilized knowingly the entire out-of-doors portions of this garage-junkyard, part-time-residence complex for commercial purposes.

In *Katz* v. *United States* (1967), 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. (2d) 576, the Supreme " * * * Court stressed that '[w]hat a person knowingly exposes to the public . . .is not a subject of Fourth Amendment protection.' *Id.* 389 U. S., at 351, 89 S. Ct., at 511, 19 L.Ed.2d, at 582. * * *" *United States* v. *Miller* (1976), 425 U. S. 435, , 96 S. Ct. 1619, 1623, L. Ed. (2d). Mr. Driver's premises, being open to the public, he is not in position to object to information obtained by officers who entered those premises within the scope of the permission extended to the public generally. *United States* v. *Harris,* C. A.

10th (1975), 534 F. (2d) 207, 210 [1], certiorari denied (1976), U. S. , 97 S. Ct. 359, 50 L. Ed. (2d) 311; *United States* v. *Agrusa,* C. A. 8th (1976), 541 F. (2d) 690, 697-698 [9-11]; *United States* v. *Various Gambling Devices,* C. A. 5th (1973), 478 F. (2d) 1194, 1200 [6]; *United States* v. *Berkowitz,* C. A. 1st (1970), 429 F. (2d) 921, 925 [3].

His motion to suppress evidence thus obtained, therefore, hereby is

OVERRULED.

ENTER:

/s/ C. G. Neese
United States District Judge

APPENDIX J

In the United States District Court for the
Eastern District of Tennessee

United States of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendents.

Memorandum Opinion And Order

(Filed January 27, 1978)

The defendant Mr. Harold Reece moved the Court to suppress evidence of an automobile seized from him herein on July 2, 1976 after a warrantless search by an agent of the Federal Bureau of Investigation and a police inspector of Chattanooga, Tennessee. Rule 41 (f), Federal Rules of Criminal Procedure. An evidentiary hearing thereon was conducted pretrial on January 24, 1978, Rule 12 (e), Federal Rules of Criminal Procedure.

Mr. Joseph M. High, a special agent of the Federal Bureau of Investigation, and Inspector Donaldson, of the Chattanooga police department, observed a Volkswagon automobile parked publicly on a road shoulder 4 or 5 feet from the fence of a commercial enterprise in or near Manchester, Tennessee on July 2, 1976, bearing 1976 Georgia automobile license plate no. EPC 192 reflecting its issuance in Cobb County, Georgia, Messrs. Donaldson and High had prior information that an automobile of similar description had been stolen earlier in Cobb County, Georgia.

Mr. Donaldson examined through the windshield of the vehicle the plainly-visible identification plate, such as those placed upon motor vehicles by their manufacturers. He observed that the original plate had been removed and replaced by another. This suspicious circumstance prompted Mr. Donaldson to enter the vehicle, lift the rear seat thereof, and inspect the "true" identification number, to enable the officers to make a positive identification of the status of the vehicle. Mr. Donaldson obtained the "true" identification number of the vehicle. Reference of that number to the National Crime Information Center resulted in information that a vehicle bearing the same number had been reported stolen in Cobb County, Georgia on December 7, 1975. The officers, thereupon seized the vehicle.

"The right of the people to be secure in their * * * effects, against unreasonable searches and seizures shall not be violated. * * * " Constitution, Fourth Amendment. The foregoing activities of the law-enforcement officers did not constitute an unreasonable search within the meaning of that amendment, however.

"* * * It is not a search [within the meaning of the Constitution, Fourth Amendment] to observe that which occurs openly in a public place and which is fully disclosed to visual observation. * * * " *United States* v. *Williams,* C.A. 6th (1963), 314 F. (2d) 795, 798 [6], cited in *Caldwell* v. *United States,* C.A. 6th (1964), 338 F. (2d) 384, 388. These officers, having reasonable cause, after discovering the original identification number on the vehicle had been replaced, to believe that the vehicle had been stolen, and having a legitimate reason to search for the "true" identification number, were authorized to check that number in order to more positively identify the vehicle. Neither was this latter activity a search within the prohibitions of the Constitution, Fourth Amendment. *United States* v. *Williams,* C.A. 5th (1970), 434 F. (2d) 681, 684 [1], citing *inter alia United*

States v. *Graham,* C.A. 6th (1968), 391 F. (2d) 439; *accord: Cotton* v. *United States,* C.A. 9th (1967), 371 F. (2d) 385, 394 [22,23].

Motion DENIED.

ENTER:

/s/ C. G. NEESE
United States District Judge

APPENDIX K

In The United States District Court for the
Eastern District of Tennessee

United States of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.,*
Defendants.

Memorandum Opinion And Order

(Filed January 27, 1978)

The defendants Messrs. Harold Reece and William P. Tolbert moved the Court to dismiss the indictment herein, as to each of them, on the ground that each is deprived herein of a speedy trial under the Constitution, Sixth Amendment,[1] the due process clause of the Fifth Amendment thereto,[2] and the provisions of 18 U. S. C. § 3161 (b). There is no merit to either such motion.

"* * * The limitations of the Due Process Clause of the Fifth Amendment, and of those portions of the Bill of Rights which it has been held to incorporate, come into play only when the government activity in question violates some protected right of the defendant. * * *" *Hampton* v. *United States* (1976), 425 U.S. 484, ____, 96 S. Ct. 1646, 1650 [3], __ L.Ed. (2d) ____,

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial. * * * " Constitution, Sixth Amendment.

[2] "No person * * * shall * * * be deprived of * * * liberty * * * without due process of law. * * * " Constitution, Fifth Amendment.

____ (per Mr. Justice Rhinequist with the Chief Justice and one Justice concurring and two Justices concurring in the judgment.)

" * * * If a defendant can show actual substantial prejudice to his right to a fair trial and that the delay was deliberately created to gain an unfair tactical advantage for the government, he is entitled to a dismissal [of the indictment] for violation of the Fifth Amendment due process rights. * * * " *United States* v. *Swainson,* C.A. 6th (1977), 548 F. (2d) 657, 663 [14]. But, " * * * to prosecute a defendant following investigative delay does not deprive him of due process. * * * " *United States* v. *Lovasco* (1977), __ U.S. ____, ____, 97 S. Ct. 2044, 2052 [9], 52 L. Ed. (2d) 752.

The only claim of any ground of these defendants of a due process violation relates to their claims that government activity herein violated their protected right to a speedy trial. The constitution guarantee to a speedy trial " * * * has been universally thought essential * * * ' [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.' * * * *Smith* v. *Hooey* (1969), 393 U.S. 374, 377-378, 89 S. Ct. 575, 577 [2], 21 L. Ed. (2d) 607. None of these essentials are implicated by the claims of the movants. Thus, only a consideration under the pertinent provisions of the Speedy Trial Act is involved.

That Act specifies in this connection:

* * * * * *

> * * * Any * * * indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. * * *

18 U. S. C. § 3161 (b). The indictment herein was returned by a grand jury on August 26, 1977. Mr. Reece was arrested in connection with such charges on September 7, 1977, and Mr. Tolbert was arrested in connection with such charges on September 15, 1977.

Both movants were charged in count I of such indictment with conspiring between themselves and with others to willfully and knowingly transport in interstate commerce stolen motor vehicles and to receive, conceal and store motor vehicles which were moving in interstate commerce between on or about November 6, 1974 and July 2, 1976.

Mr. Reece was charged additionally in court II thereof with the substantive offense of having received and concealed between July 7, 1975 and July 2, 1976 a certain stolen 1972 Volkswagen automobile moving in interstate commerce, knowing such vehicle to have been stolen, and Mr. Tolbert was charged additionally in count III thereof with the substantive offense of having transported in interstate commerce on or about July 2, 1976 a certain 1975 Volkswagen automobile from Georgia to this district, knowing such vehicle to have been stolen. Both of the movants contend each was arrested in connection with those respective substantive charges on July 2, 1976.

Mr. Tolbert testified that he was arrested on July 2, 1976 by a Mr. Wickes, an agent of the Tennessee bureau of criminal identification, and Mr. John D. Jones, a special agent of the Federal Bureau of Investigation, for the interstate transportation of a stolen car. He testified he was enlarged on an appearance bond on July 6, 1976.

Exhibits in Mr. Tolbert's hearing reflect that his appearance bond ran to the state of Tennessee " * * * but to be void on the condition that * * * [he] * * * shall make his personal appearance before the Judge of the *G.S.C. & Circuit* Court for said [Coffee] County [Tennessee], at a court to be held at the

Courthouse in the town of Manchester * * * " on a certain date and at a certain hour, "* * * to answer the State of Tennessee on a charge of *Rec. & Conc. stolen goods.* * * * " They reflect also that on July 10, 1976 a justice of the peace of Coffee County, Tennessee issued a warrant for the arrest of Mr. Tolbert for the offense of "* * * Receiving and concealing Stolen property one Volkswagon automobile. * * * " Mr. Tolbert was arrested under that warrant on July 26, 1976, and on the same date that charge was dismissed.

Mr. Reece testified that he was arrested on July 2, 1976 by two special agents of the Federal Bureau of Investigation. Exhibits in his hearing reflect the same information as hereinabove as to his appearance bond, the issuance of a warrant of the state of Tennessee for his arrest on an identical charge, his arrest (at his home in Georgia) thereunder, and the dismissal of the state charges. The aforementioned FBI agent Mr. Jones testified that neither Mr. Reece nor Mr. Tolbert was arrested on July 2, 1976 on a charge connected with a federal criminal offense.

" * * * [C]harging an individual with the commission of an offense, * * * " as utilized in 18 U. S. C. § 3161 (b), means charging an individual with the commission of " * * * any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress. * * * " 18 U. S. C. § 3172 (2). The fact that a federal officer made, or participated in making, the respective arrests of Messrs. Tolbert and Reece did not convert the state offenses, with which each was charged, into federal offenses.

The federal officers were permitted to effect as private citizens a warrantless arrest of the movants for offenses against the state of Tennessee under the circumstances of these arrests. *Cf. United States* v. *Carter,* C.A. 8th (1975), 523 F. (2d) 476, 478 [3].

Each such motion, therefore, hereby is DENIED.

The defendant Ms. Virginia R. Brown moved for a dismissal of the indictment against her herein on the same grounds as the foregoing. She claimed that, if the prosecution is predicating the right of the officers upon a search of her premises incidental to a lawful arrest, then the provisions of 18 U. S. C. § 3161 (b) are applicable herein.

The prosecution did not so predicate its claim; accordingly, there is no merit to Ms. Brown's contentions, and her motion to dismiss the indictment herein hereby is

DENIED.

ENTER:

/s/ C.G. NEESE
United States District Judge

APPENDIX L

In The United States District Court for the
Eastern District of Tennessee

United States Of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendants.

Memorandum To Counsel

(Filed January 31, 1978)

The defendants Messrs. Reece and Tolbert moved for reconsideration of earlier actions of the Court herein involving them, in which they appear to take issue with the Court's recollection of certain facts testified to on the hearings herein. Obviously, this Court relied on his recollection of the testimony and, if a defendant recalls otherwise, the pertinent portions of the transcript should be provided to obviate all doubt as to what a witness may have testified.

FILE:

C. G. NEESE
United States District Judge

APPENDIX M

In The United States District Court for the
Eastern District of Tennessee

United States Of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendants.

Memorandum Opinion

(Filed February 1, 1978)

The defendants Mr. Driver and Ms. Brown moved for a further hearing to suppress evidence utilized by the grand jury in returning an indictment herein. The motion lacks merit.

The motion is untimely, Rule 12 (b)(2), (3), Federal Rules of Criminal Procedure. The indictment is not subject to challenge on the ground that the grand jury acted on the basis of incompetent evidence. *United States* v. *Calandra* (1974), 414 U.S. 338, 344-345, 94 S. Ct. 613, 618 [3], 38 L. Ed. (2d) 561; see also *United States* v. *Blue* (1966), 384 U. S. 251, 255, 86 S. Ct. 1416, 1419, n. 3, 16 L. Ed. (2d) 510.

The motion was denied properly.

FILE:

/s/ C. G. NEESE
United States District Judge

APPENDIX N

In The United States District Court for the
Eastern District of Tennessee

United States Of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendants.

Memorandum Opinion

(Filed February 2, 1978)

The defendants Mr. Driver and Ms. Brown objected to evidence by exhibits offered by the prosecution in the form of aerial photographs of Ms. Brown's house and surrounding property showing *inter alia* a number of motor vehicles parked there. These photographs were taken with a long-range camera by Mr. Micheal Waguespack, a special agent of the Federal Bureau of Investigation, from a helicopter. Ms. Brown claims a violation thereby of her rights secured by the Constitution, Fourth Amendment.

"The right of the people to be secure in their * * * houses * * * against unreasonable searches and seizures shall not be violated. * * * " Constitution, Fourth Amendment. Thereunder: " * * * A search is a probing or exploration for something that is concealed or hidden from the searcher. * * * " *United States* v. *Haden,* C.A. 7th (1968), 397 F. (2d) 460, 465 [4], certiorari denied (1970), 396 U. S. 1027, 90 S. Ct. 574, 24 L. Ed. (2d) 523. It " * * * implies invasion and quest, which in turn implies some sort of force, actual or constructive, much or little. * * * " *United States* v. *Cook,* D. C. Tenn.

(1962), 231 F. Supp. 568, 571 [2], citing *State v. Quinn* (1913), 11 S.C. 174, 97 S. E. 62, 3 A. L. R. 1500. It is not a search when " * * * the officer merely saw what was placed before him in full view. * * * " *Ker* v. *State of California* (1963), 374 U.S. 23, 43, 83 S. Ct. 1623, 1635, 10 L. Ed. (2d) 726.

In the short time available for research, the Court has discovered no decision as to the operative effect of the Fourth Amendment on photographs taken from above a person's dwelling, and none is called to the Court's attention. The late Mr. Justice Holmes long ago sanctioned the use of a searchlight, a marine glass or a field glass by law enforcement officers to observe what is going on on a citizen's property. *Hester* v. *United States* (1924), 265 U.S. 57, 58, 44 S. Ct. 445, 446, 68 L. Ed. 898, cited in *United States* v. *Lee* (1927), 274 U. S. 559, 563, 47 S. Ct. 746, 748 [5,6], 71 L.Ed. 1202. As the equipment available to government agents becomes more sophisticated and instrusive within the homes of the people, there may be different rules applied; but, that is not a matter for this Court to determine at this time.

The objection was overruled, and the exhibits of the aerial photographs were admitted into evidence.

FILE:

/s/ C. G. NEESE
United States District Judge

APPENDIX O

In The United States District Court for the
Eastern District of Tennessee

United States Of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendants.

Ruling On Objection

(Filed February 4, 1978)

The prosection objected to the Court's consideration of any motion by a defendant herein for the entry of a judgment of acquittal who had introduced any evidence while the prosecution was introducing its evidence. Such motion was held under advisement; it lacks merit and herby is DENIED.

" * * * The Court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment * * * after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for a judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved its right." Rule 29 (a), Federal Rules of Criminal Procedure.

It is only " * * * the introduction of evidence by [a] defendant after his motion * * * " made at the close of the evidence offered by the government " * * * has been denied [that] is a waiver of that motion. * * * " 2 Wright, Federal Practice and Procedure: Criminal 246-247, § 463. At that point in the trial, a

defendant " * * * must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty. * * * " *McGautha* v. *California* (1971), 402 U.S. 183, 215, 91 S. Ct. 1454, 1471, 28 L. Ed. (2d) 711.

A defendant is not required to offer any evidence at all, and there must be no fettering of the exercise of his will in the order in which he presents any evidence he may wish to offer anytime during the trial, *cf. Brooks* v. *Tennessee* (1972), 406 U. S. 605, 610, 92 S. Ct. 1891, 1894, 32 L. Ed. (2d) 358. The question at the close of the evidence offered by the prosecution is, not whether a defendant up to that point offered any of it, but rather whether all the evidence then before the Court is sufficient to sustain a conviction of an offense or the offenses charged in the indictment or information. If that question is decided adversely to a defendant, he makes his decision whether to stand on his contention that the evidence adduced to that point in the trial is insufficient to sustain his conviction.

If he offers no *further* evidence, he has the benefit of his motion on any motion for a new trial or appellate review of his conviction. If, on the other hand, he waives reliance on his motion made at the close of the evidence offered by the prosecution, on a subsequent motion for a new trial or in appellate review, he may rely only on the insufficiency of the evidence at the close of all the evidence to sustain his conviction.

ENTER:

/s/ C. G. NEESE
United States District Judge

APPENDIX P

In The United States District Court for the
Eastern District of Tennessee

United States Of America,
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, *et al.*,
Defendants.

Memorandum And Order

(Filed March 1, 1978)

The defendants filed herein numerous posttrial motions and requested the Court to permit oral argument on their motion for a judgment of acquittal notwithstanding the jury verdict and on their motion for a new trial.[1] The government failed to make a timely response to any such motion, local Rule 12 (b), and is deemed to have waived any opposition thereto, local Rule 11 (f).

" * * * Whether oral argument is heard on a written motion [in a criminal action] depends on court rule or, in the absence thereof, on the practice of the individual judge." 8B Moore's Federal Practice (2d ed.) 47-4, ₅ 47.02. In this district it is provided that all motions will be decided by the Court without a hearing unless otherwise ordered in the discretion of the Court,

[1] The defendants' motion herein of February 13, 1978, for an enlargement of the time within which they are allowed to file such posttrial motions, have been rendered moot by their timely filing of such motions.

provided that, if the motion is determinative of the case on its merits, the Court will allow an oral haring if requested by either party. Local Rule 12 (c).

It appearing that the defendants' motion for a judgment of acquittal notwithstanding the jury verdict is determinative of this case on the merits, the movants are entitled to be heard on oral argument. *Idem.* Further, in its discretion, the Court hereby ALLOWS such oral argument on the defendants' motion for a new trial even though such obviously would not be determinative of the case on the merits.[2]

Such oral argument hereby is assigned to be heard Wednesday, March 8, 1978, at the United States Courthouse in Greeneville, Tennessee, at 10:00 o'clock in the forenoon.

All other matters hereby are RESERVED.

ENTER:

/s/ C. G. NEESE
United States District Judge

[2] The defendants cite no authority in support of their contention that they have a guaranteed right under the Constitution, Fifth Amendment, due process clause, to have such oral argument, and the Court's research has disclosed no such authority.

APPENDIX Q

In the United States District Court for the
Eastern District of Tennessee

United States of America
Plaintiff,

v. No. CR-4-77-7

Thomas Bennett Driver, et al.,
Defendants.

Memorandum Opinion and Order

(Filed March 15, 1978)

After the discharge of the jury herein, each of the defendants renewed his or her respective motions for entry of a judgment of acquittal as to each count of the indictment herein as to which he or she was charged. Rule 29 (c), Federal Rules of Criminal Procedure. Each defendant moved also, in the alternative, for a new trial. Rule 33, Federal Rules of Criminal Procedure. As requested by the defendants, an oral hearing on such motions was conducted on March 8, 1978. Thereafter, the motion of the defendant Mr. Tolbert was granted, a judgment of his acquittal was entered, and he was released from custody on the charge herein only.

There is no merit to such motions of the other defendants in the first aforementioned alternative. The only question thereon is whether the evidence was sufficient to sustain a conviction of such defendant under the particular charge(s) in the indictment against him or her. The evidence and all reasonable inferences flowing therefrom were construed most favorably to the prosecution. *United States* v. *Stroble,* C. A. 6th (1970). 431 F. (2d) 1273, 1276 [5].

" * * * The test is the same where the evidence is purely circumstantial. The verdict of the jury must be maintained if there is any substantial evidence supporting it. * * *" *Idem.* The Court is precluded from reweighing the evidence or accrediting the witnesses, its function being limited to a determination of whether the government made a sufficient showing to allow the counts of the indictment which remained for consideration to go to the jury. *United States* v. *Williams,* C. A. 6th (1974), 503 F. (2d) 50, 53 [3]. The respective motions of the defendants must be overruled, because the Court concluded that reasonable minds might have concluded fairly guilt on each remaining charge beyond a reasonable doubt. *United States* v. *May,* C. A. 6th (1970), 430 F. (2d) 715, 717 [2].

As to the conspiracy count (I) of the indictment, there was proof that the defendants arrived at an agreement to act together in committing an offense charged, and that an overt act was accomplished in furtherance of the resulting conspiracy. *United States* v. *Williams, supra,* 503 F. (2d) at 54 [6]. A conspiracy is an inchoate offense, " * * * the essence of which is an unlawful act. * * * " *Iannelli* v. *United States* (1975), 420 U. S. 770, 777, 95 S. Ct. 1284, 43 L. Ed. (2d) 616, 622 [3a]. The jury could have inferred an agreement of the defendants herein from the facts and circumstances shown by the evidence. *Ibid.,* 420 U. S. at 777, 43 L. Ed. (2d) at 623, n. 10 [3b]. Only slight evidence was required to connect thereafter a particular defendant with it, once the existence of a conspiracy was established by the evidence. *United States* v. *Smith,* C. A. 6th (1977), 561 L. (2d) 8, 12 [2], certiorari denied (1977), U. S. , 98 S. Ct. 487, L. Ed. (2d) .

The Court has adjudicated earlier: the motion of the defendant Mr. Driver to suppress the evidence obtained in the search of his commercial and semi-residential premises, see memorandum opinion and order of January 26, 1978; the similar motion of the defendant Mr. Reece regarding the search of an

automobile he had driven, see memorandum opinion and order of January 24, 1978; the motion of the defendant Ms. Brown as to the search of her residential premises, see memorandum opinion and order of January 26, 1978; and the joint motion of Mr. Driver and Ms. Brown as to the aerial photographs admitted into evidence, see memorandum opinion of February 2, 1978. It would serve no useful purpose to readjudicate those holdings which this court believes were, and are, correct.

There is no merit either to such motions in the second aforementioned alternative. The defendant Mr. Driver emphasized the purported error of the Court in failing to grant him a severance of counts and of defendants and a separate trial. The Court addressed the matter in its memoranda opinions and orders of January 20, 1978.

Mr. Driver stresses the fact that his co-defendant Mr. Tolbert could have been known by the jury to have been in custody of law enforcement officers during the multi-day trial herein, and, although he (Mr. Driver) was not acquainted with Mr. Tolbert previous to the events in which they were charged jointly with crime, the reasonable inference the jury could have drawn from the fact of their joint trial was that Mr. Tolbert was a convicted law-breaker, that Mr. Driver was being tried with him for breaking the law, and that Mr. Driver, thus, must be a violater, too.

The Court charged the jury carefully on this point; there were no special requests by any defendant for instructions to the jury, and there was no objection thereto by any defendant. Among other things, the Court stated:

* * * * * * * *

> Each offense and the evidence applicable thereto must be considered and should be considered separately as it pertains to a particular defendant.

* * * * * * * *

> It is your duty to give separate, personal consideration to the case of each of these 4 defendants. Each of the individual defendants is entitled to have his or her case determined from his or her own acts and statements and the other evidence in the case which may be applicable to him or her.
>
> The fact that you may find one defendant guilty or not guilty as to any offense should not control your verdict with respect to the offense or offenses charged against any other defendant.
>
> The verdict you return as to each defendant must represent the considered judgment of each one of you.* * *

It must be assumed that the jury followed conscientiously these instructions. *Shotwell Mfg. Company* v. *United states* (1963), 371 U. S. 341, 367, 83 S. Ct. 448, 9 L. Ed. (2d) 357, 375 (headnote 22), rehearing denied (1963), 372 U. S. 950, 83 S. Ct. 931, 9 L. Ed. (2d) 975. Further discussion of the claims of Mr. Driver and Ms. Brown for a new trial appear unnecessary in the light of the full written record this Court has made herein.

The defendant Mr. Reece seeks a new trial on the ground that he was subjected for the same offense to be twice put in jeopardy, Constitutuion, Fifth Amendment. The record does not reflect that such defendant was ever in jeopardy in a state court for the offense charged against him herein; even were the reverse of that factual situation true, the double jeopardy provision of the Fifth Amendment, *supra,* is not violated by successive prosecutions in state and federal courts for the same offense. *Bartkus* v. *Illinois* (1959), 359 U. S. 121, 136, 79 S. Ct. 676, 3 L. Ed. (2d) 684, 694 (headnote 8), rehearing denied (1959), 360 U. S. 907, 79 s. Ct. 1283, 3 L. Ed. (2d) 1258.

The same defendant moved the Court to vacate his judgment of conviction herein, dismiss the indictment as it pertains to him with prejudice, or enter a judgment of acquittal of him not-

withstanding the verdict. Rules 29 (c), *supra,* and 48 (b), Federal Rules of Criminal Procedure. He insists he has been deprived of a speedy trial, Constitution, Sixth Amendment.

The right thereto does not attach until the formal charge is made, the trial of which is alleged to have been delayed inordinately and prejudicially. *United States* v. *Marion* (1971),404 U. S. 307, 92 S. Ct. 455, 30 L. Ed. (2d) 468, cited in *United States* v. *Martin,* C. A. 6th (1976), 543 F. (2d) 577, 579 [2], certiorari denied (1977), U. S. , 97 S. Ct. 762, L. Ed. (2d) . Under the criteria of *Barker* v. Wingo (1972), 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. (2d) 101, it is obvious that such defendant was not deprived of his constitutional right to a speedy trial.

The formal charges against Mr. Reece arose with the return of the indictment herein on August 26, 1977, and Mr. Reece was arrested thereunder on September 15, 1977. Assuming *arguendo* that Mr. Reece had been arrested on July 2, 1976, as he claims, this Court would be reluctant to hold that a violation of his claimed right had occurred when the record indicates so positively that the defendants did not want a speedy trial. *Ibid.*, 407, U. S. at 536, 33 L. Ed. at 120 [39].

Each motion of each remaining defendant for the entry of a judgment of acquittal and for a new trial, for such reasons, hereby was

DENIED.

ENTER:

/s/ C. G. Neese

United States District Judge